

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1180 of 2000

WITH

CIVIL APPLICATION NO 6368 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

O N G C

Versus

ESSAR STEEL LTD.

Appearance:

MR RAJNI H MEHTA for Petitioner

MR SUNIT S SHAH for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE K.M.MEHTA

Date of decision: 17/10/2000

ORAL JUDGEMENT

1. The appellant - Oil & Natural Gas Corporation (ONGC) has challenged the judgment and order dated 22/3/2000 recorded by 6th Joint Civil Judge (S.D.) Vadodara in Arbitration Misc. Civil Application No. 106 of 1999, whereby, the application u/S. 14 of the Indian Arbitration Act, 1940 has been made rule of Court with slight modification by invoking the test of the provision of section 37 (1)(vi) of the Arbitration Act, 1940 (1940 Act).

2. A resume of the material facts giving rise to this appeal may, briefly, be narrated so as to appreciate the merit of the present appeal at the admission stage and in order to appreciate the merits the learned advocate appearing for the appellant - ONGC placed reliance on the documentary evidence which was placed for our consideration at the admission stage. Following aspects have remained uncontroverted -

(1) Agreement was entered into on 25/4/1991 between the original claimant Essar Steel Ltd. and respondent ONGC for deployment of drilling rig for the purpose of drilling and to carry out auxiliary operation for the purpose of producing oil and/or gas in Gandhar belt. The disputes and differences between the parties had arisen under the said agreement and therefore, as per the terms incorporated in the agreement, the dispute upon failure to be resolved mutually between the parties, was required to be referred to Joint Director in terms of the contract. Claimant Essar Steel filed its statement of claims before the Arbitrators, which was resisted by the respondent ONGC appellant before us. The Arbitrators after hearing the parties and considering all the documentary evidence and pleadings recorded award on 23/3/1999 rejecting the claim nos. 1 and 3 while granting claims nos. 2, 4, 5 and 6. Thereafter the Arbitrators moved the Court by giving an application and praying that the award be taken on record for further necessary statutory action.

3. Upon filing of such application, obviously notice came to be issued to the parties. Respondent ONGC filed written objections at exh. 11; whereas the claimant Essar Steel Ltd. filed reply to the said objections at exh. 14. Whereas exh. 16 is affidavit-in-rejoinder filed by the respondent. The respondent inter-alia contended that the award passed by the Arbitrator in respect of claims nos. 2, 4, 5 and 6 is against the terms and conditions of the contract. The Arbitrators have not applied their minds to the specific provisions

of the contract, pleadings and documentary evidence and have ignored specific provision of contract regarding payment to the claimants. It was also the case of the respondent that the contract provided that all the payments shall have to be made in Indian currency; whereas the Arbitrators while granting claims of the claimant has allowed the claims in terms of US Dollars and while granting the claims the Arbitrators have failed to convert the US Dollars in Rupees. In that context it was also submitted that the value of Dollars is increasing because of devaluation of Rupees. The rate of interest awarded at 12% was alleged to be exorbitant. It was also contended that the Arbitrators have wrongly awarded claim no. 2 and claim no. 4. The Arbitrators have exceeded the jurisdiction vested in them was also one of the objections raised by the respondent ONGC, who is appellant before us. One of the objections was with regard to the loss of equipments and tools and the respondent pleaded that the responsibility was solely on the part of the claimant.

4. The trial Court after considering the facts and circumstances, rival contentions and the record of the case found that the objections raised by the appellant original respondent - ONGC are not sustainable and, therefore, objections came to be dismissed. However, award came to be modified as stated hereinbefore. Award is also modified so far as claim nos. 2 and 5 are concerned wherein interest at 11% p.a. on US Dollar instead of 12% from the due date till the payment is concerned. Rest of the claims stood allowed. Accordingly the award of the Arbitrators was made as a rule of Court with modification as aforesaid which is precisely under challenge before us in this appeal.

5. At the admission stage we have heard learned advocate appearing for the appellant original respondent ONGC. We have, also, exhaustively examined the documentary evidence relied on by the parties and accepted by the Arbitrators at the admission stage, which were supplied to us by him. The appeal is filed against the order of the trial Court u/S. 39 which provides for appeals in Chapter VI of the Arbitration Act, 1940. Clause (vi) of sub-section (1) of section 39 is invoked which provides that an order setting aside or refusing to set aside an award is an appealable order. The trial Court has refused to set aside the award. Therefore, this provision is invoked by the ONGC. In section 39 sub-section (1) provision is made for appeal and clauses (i) to (v) provide as to which orders could be appealed against with which we are not concerned in so far as the

merits of this appeal are concerned. The clause (vi) provides that order of setting aside or refusing to set aside the award is appealable. It is in this context, let us have look at the provisions of sections 33, which prescribes grounds for setting aside award. In view of provision of section 30 award given by the Arbitrator cannot be set aside except on one or more of the following grounds -

(1) That an Arbitrator or Umpire misconducted himself of the proceedings, (2) that an award has been made after the issue of order by the court superseding the arbitration or after arbitration proceedings have become invalid u/S. 35, (3) the award has been improperly procured or is otherwise invalid. It is amply clear from the statutory scheme incorporated in section 30 that the jurisdictional sweep of a Civil Court u/S. 14 or an appellate Court u/S. 39 has been very much circumscribed. Section 30 read with section 16 provide the parameters highlighting as to what are the grounds on which the award of the arbitrator can be quashed and set aside or could be remitted back to the arbitrator. Whereas section 33 prescribes the procedure. Section 33 reads as under :-

"33. Arbitration agreement or award to be contested by application.- Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass orders for discovery and particulars as it may do in a suit."

It is, amply, clear on a plain perusal of section 33 that the only mode of challenging the existence, validity of an effect of arbitration agreement or award by way of application u/S. 33. It is, therefore, necessary to find out in the light of the aforesaid statutory and legal principles as to whether the contention advanced before us in relation to the merits of the appeal referable to the award which is made rule of Court by the trial Court is in any way falling within the aforesaid

prescribed para-meters or not or is in any way invalid.

6. The award dated 23/3/1999 between the parties is a detailed speaking order. There were two Arbitrators one Mr. Justice B.J. Diwan, who is retired Chief Justice of this Court and the other Arbitrator was Mr. M.D. Tambekar, retired Chief Engineer (BPT). We have examined the entire award and the impugned order of the trial Court. The points which were agitated before the Arbitrators and repeated before the trial Court have been reiterated in this Court. The trial Court has dealt with this aspect in the light of the facts and circumstances of the case and the relevant propositions of law in para. 4 of the impugned order. At this stage it may be stated that the powers of appellate Court in exercise of section 39 read with section 33 are not the same as that of powers contemplated u/S. 96 of the Civil Procedure Code (C.P.C.). Following legal propositions may be highlighted which cannot be disputed : (1) that Court cannot substitute its own view in place of Arbitrators' view. (2) Appellate Court cannot examine matter as a regular appeal or as a regular appellate authority (3) It is well known that Court while considering the question whether award should be set aside or not. (4) Court does not examine the question as an appellate Court. (5) While exercising such a power u/S. 39 read with section 33 of the 1940 Act the appellate Court cannot re-evaluate or reappreciate all the materials on the record for the purpose of recording a finding whether the facts and circumstances of the particular case the award of the Arbitrator in question could have been made. (6) Such award can be set aside on any one of the grounds satisfied in section 30 of the Act read with section 33. Section 30 of the Old Act corresponds to section 40 of the older Act like that Indian Arbitration Act, 1899 and para. 15 of the Second Schedule of the C.P.C. The corresponding section of the English Act is section 11 sub-section (2) of the Act of 1989. (7) Section 11 of the Indian Arbitration Act, 1899 was as follows :-

"Where an Arbitrator has misconducted himself or an arbitration or award has been improperly procured, the Court may set aside the award."

Similar para. 15 was incorporated in Second Schedule of C.P.C. (8) There does not appear to be any sure allegation of misconduct. (9) So far as the hearing on the merits of the award is concerned, the Court has nothing to say good, bad or indifferent. (9) It has no right to review award or reconsider it like the first appellate court u/S. 96 of the C.P.C. (10) Unless and

until the case, squarely, falls within one or more grounds incorporated in section 30, award of the arbitrator cannot be set aside. (11) There is a purpose and policy behind such provision though there is an appeal provided for the simple reason that the fundamental aim and design of settlement of disputes through the media of arbitration is to lead to expeditious disposal or settlement of the controversy between the parties or differences between the parties to a contract. (12) Arbitral or domestic Tribunal justice is one of the effective alternative dispute resolution, which is not only a call or the cry of the day, but is a creed of the time. (13) Parties having chosen to get dispute resolved through the arbitral process, ordinarily Court should not interfere unless one of the grounds incorporated in section 30 is successfully pointed out or is spelt out. (14) Mere because a different projection or perfection on issue was persivable does not assume sufficient launching for exercising appellate power. (15) It is not open to the Court to speculate in a given case where the reasons are not given by the Arbitrator as to what compelled Arbitrator to reach particular conclusion. (16) It is not the function of the Court or an appellate Court to make deeper probe about the psychological process by which the arbitrator has concluded in absence of terms of the award. (17) Even if arbitrator commits a mere error of fact or law in reaching his conclusion on the disputed issue or question it is not a good ground for interference by the Court. (18) In a case of non-speaking award the power of the Court is still very much sunk down. No-doubt if the Arbitrator acted beyond the jurisdiction or any such act of misconduct is noticed or pointed out even award or Arbitrator can be set aside. (19) In order to ascertain as to whether the Arbitrator has made any deter or has selected any diversion from the main highway of jurisdiction, it would be necessary to consider the agreement between the parties incorporating an arbitration clause. (20) Action of Arbitrator beyond his jurisdiction is altogether a different ground from the mere error on the face of the award. (21) With a view to ascertain as to whether the Arbitrator has exceeded his jurisdiction, what is to be considered. Whether the claimant has to give particular claim before the Arbitrator. If there is a specific permission in the agreement or contract or the law which does not permit or give the Arbitrator power to decide the dispute or the differences raised and referred to the Arbitrator, the scope will be limited. (22) Truly the Arbitrator should not act arbitrarily, capriciously, irrationally or emotionally or independently of the contract. (23)

Arbitrator as a matter of fact is not an Arbitrator or a conciliator and, therefore, he cannot afford to bypass the law in order to do which he thinks just and reasonable. Since the parties have selected domestic or arbitration which is a Tribunal. Therefore, the Tribunal resolving the controversy, difference or dispute between the parties selected by the parties should be allowed to decide the dispute according to law.

7. The aforesaid characteristics and important and integral arbitration proceeding principles have been succinctly expounded, propounded and seriously criticised by catena of judicial pronouncements. We would, therefore, like to highlight following decisions which reinforce our view :-

- i. J.U. Sheth's case reported in AIR 1965 S.C. 214
- ii. Rajasthan State Mines and Minerals India Ltd.
v/s. Eastern Engineering Enterprises reported in AIR 1999 S.C. 3627, in which after considering several decisions of the Hon'ble Apex Court various principles have been evolved.
- iii. B.V. Radhakrishna v/s. Sponge Iron India reported in AIR 1999 S.C. 1234, wherein it has been made crystal clear that the High Court cannot substitute its own view in place of Arbitrator's view and it is not open for the High Court to examine the matter in appeal as a regular appellate Court.

8. On a plain perusal of the award it shows that the evidence has been considered in appreciation and various conditions have been examined and dealt with. The condition with regard to rate of interest for a payment of Dollars is also considered by the trial Court. The issue of sur-charge of high speed decend could not be said to have not been examined by the Arbitrators. The Arbitrators have dealt with this issue and considered it by reference to article 8.1 of the contract. It, therefore, cannot be said that the claim is outside the contract.

9. The contentions with regard to loss of tools and equipments do not find favour with the trial Court because the Arbitrators have referred insurance certificate in their award showing that there was no liability in respect of drills stern left in the well. Obviously therefore, the said equipments are found to be non-insurable. Again the revision in the claim was on account of arithmetical error. It is a settled proposition that arithmetical mistake or error could be

corrected or managed at any time. Even after the passing of decree the bonafide mistake apparent on the record of arithmetic or calculation can be corrected. Award therefore cannot be set aside on such a flimsy or unsubstantial ground of correction in arithmetic mistake. Again it is amply clear from the record that the respondent had all the chances and substantial real particular to meet with the case. It is in this context the Court has observed that on the contrary ONGC appellant before us has been benefited by taking depreciation from 1991. This issue is very well dealt with and determined by the Arbitrators at length with reasons, even different view could not be possible. Claimant also had shown the willingness to accept interest at 11% p.a.

In view of the aforesaid facts and circumstances and discussions and the material significant principles of law of arbitration, the design of the arbitration proceedings and the limited jurisdictional sweep of an appellate Court power, we are of the clear opinion that the award of the Arbitrators in absence of any cognizable misconduct or recognisable excess of jurisdiction, the trial Court has rightly passed the impugned order making the award of the Arbitrators rule of the Court and resultant challenge against it before us in this appeal is not only fruitless, not only substanceless, but totally devoid of merits and, therefore, only the fate it deserves is the dismissal at the threshold. Accordingly appeal is dismissed at the admission stage.

* * *

PVR.